Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-78 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ALASKA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether a lake is rendered navigable, for purposes of determining ownership of its bed, solely because floatplanes use the lake for takeoffs and landings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8), as amended (Pet. App. B1), is reported at 754 F.2d 851. The opinion of the district court (Pet. App. C1-C9) is reported at 563 F. Supp. 1223.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1985. On May 22, 1985, Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including June 28, 1985. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under the Equal Footing Doctrine, each of the states, upon admission to the Union, is vested with title to lands beneath inland navigable waters within its boundaries. The issue in this case is whether a state may establish that a lake is navigable, and that the state therefore owns the submerged lands, simply by showing that floatplanes use the lake for takeoffs and landings.

1. Petitioner, the State of Alaska, brought this suit to quiet title to the bed of Slopbucket Lake, a small body of water located near Iliamna Lake in southern Alaska (Pet. App. A2-A3, C1). Petitioner alleged that Slopbucket Lake is navigable in its entirety and that title to the bed of the lake therefore passed to Alaska at statehood under the Equal Footing Doctrine (*id.* at A3-A4, C2-C3).[1] Prior to this suit, the Department of the Interior's Bureau of Land Management (BLM) had concluded that the lake was non-navigable (*id.* at A2, C1-C2). That determination was made for the purpose of assessing the acreage entitlement of native corporation land selections under the Alaska Native Claims Scttlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*[2]

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[1]Petitioner also relied upon the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, and Section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343. See Pet. App. A3-A4, C2-C3.

[2]The BLM is charged with responsibility under ANCSA for determining whether bodies of water located within native acreage selections are non-navigable and, hence, whether the lands beneath those waters are federally owned "public lands" available for conveyance to native corporations under the Act. 43 C.F.R. 2650.5-1(b). See 43 U.S.C. 1611. Based on the BLM's determination, the United States executed interim conveyances granting the surface of Slopbucket's lakebed to respondent Iliamna Natives, Ltd. and the subsurface estate of the lakebed to respondent Bristol Bay Native Corporation (Pet. App. C2). See 43 U.S.C. 1613. Petitioner did not directly challenge the BLM's determination that Slopbucket Lake was non-navigable (Pet. App. C2). It did assert, however, that the United States lacked authority to convey any

Petitioner moved for summary judgment, contending that Slopbucket Lake was used at the time of statehood by floatplanes, that floatplanes are a customary mode of trade and travel in Alaska, and that, as a matter of law, floatplane use renders a lake navigable for purposes of determining ownership of the lakebed (Pet. App. A3, C4). The federal defendants simultaneously moved for partial summary judgment that aircraft use of a lake for takeoff and landing does not, as a matter of law, render a body of water navigable for purposes of determining title (*ibid.*) The federal defendants argued that, even if petitioner's factual allegations concerning floatplane use on Slopbucket Lake were true, evidence of floatplane use could not satisfy the federal navigability test (*ibid.*).

The district court granted the federal defendants' motion and denied petitioner's motion (Pet. App. C8). The court, relying upon the classic definition of navigability announced by this Court in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870), recognized that "[a] body of water is navigable under federal law when it is used or susceptible of use in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water" (Pet. App. C3). The court held that floatplane use did not establish navigability under this test.

The court specifically ruled that "floatplanes may not be considered a mode of conducting commerce *on water* for the purpose of determining navigability for title" (Pet. App. C7, emphasis in original). The court noted that "[a]ll the previously recognized modes of conducting commerce in determining navigability for title involve either vessels or

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interest in the bed of Slopbucket Lake and sought declarative and injunctive relief preventing the transfer of title from the federal government to the native corporations.

III
DECISIONS BELOW

The decision of the Court of Appeals below is reported at 754 F.2d 851. The decision of the district court appears at 563 F.Supp. 1223.

IV
REASONS FOR GRANTING THE WRIT

This petition for certiorari presents the Court with a simple, straight-forward legal issue: the legal status of commercial floatplane operations in litigation where a state is seeking to perfect its sovereign title to the bed of a navigable waterway. Applicable decisions of both this and other federal and state appellate courts indicate that such use by floatplanes is fully relevant in determining navigability for federal title purposes.

A. Longstanding Federal Precedent Establishes That Navigability for Title Purposes Is a Broad and Flexible Concept

The Supreme Court has repeatedly emphasized the dymamic nature of the test of navigability for title purposes. The decision of the Court of Appeals, however, adopts a different course by eliminating one particular mode of waterway commerce—floatplanes—from consideration on the issue of whether a river or lake is navigable for purposes of determining title to the bed.

The title test of navigability began as a broad and flexible concept when first laid down in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870):

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The related principles which this Court has evolved further exemplify the flexible construction of the navigability test. For example, navigability does not depend on the particular mode of use. The requisite navigation may be by any "customary method of trade or travel." (*The Daniel Ball, supra,* 77 U.S. at 563; *United States v. Holt State Bank,* 270 U.S. 49, 56 (1926).)

Floatplanes are the customary mode of trade and travel on waterbodies such as Slopbucket Lake. By excluding such use concerning the issue of navigability for title purposes, the decision of the Court of Appeals potentially narrows the navigability test, reducing the ability of states to perfect their sovereign title claims.[2]

The decision below stands in contrast to decisions by this Court finding another type of unconventional navigation—logging drives—meaningful evidence of navigability. In *St. Anthony Falls Water Power Co. v. St. Paul Comm.,* 168 U.S. 349, 359 (1897), the Court held the Mississippi River navigable at St. Anthony Falls based on evidence of flotation of logs at that point. Similarly, transportation of timber and lumber, boated and rafted down a difficult stretch of New River in Virginia were found to constitute evidence of navigability in *United States v. Appalachian Power Co., supra,* 311 U.S. 377, 411. Like floatplane use, transportation

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[2] The Decision of the District Court, which the Court of Appeals affirmed, was also unduly narrow and erroneous, in three respects. First, the district court apparently treated the navigability test as more stringent for title than for Commerce Clause purposes. In fact, the test differs only in that navigability under the Commerce Clause may arise after statehood and as a result of reasonable improvements, with an effective interstate link required. (*United States v. Appalachian Power Co.,* 311 U.S. 377, 406-408 (1940).) Second, the district court decision cites absolutely no authority for its incorrect view that the use involved must be "primarily waterborne in nature." (563 F.Supp. at 1227.) Third, the district court improperly premised its denial of Alaska's sovereign title to the bed of Slopbucket Lake on the view that a contrary ruling "would severely complicate the federal land selection scheme." (Id., at 1227 (fn. 5).) Significantly, the opinion of the Court of Appeals neither corrects these errors nor clarifies the applicable law.

of logs and timber products depend on water for only a portion of their overall journey. For example, it is usually necessary to transport these materials by land from the logging site to a lake or river. Following water transport, animals or machines have commonly been used to move these resources overland to their ultimate destination.

The circuit courts, including the Ninth Circuit, also have held repeatedly that transportation of logs and timber products is sufficient to prove navigability. (*Loving v. Alexander* 745 F.2d 861 (4th Cir. 1984); *State of Oregon v. Riverfront Protective Ass'n.*, 672 F.2d 792 (9th Cir. 1982); see also, *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785, 788-789 (9th Cir. 1981), cert. den. 454 U.S. 1053 (1981); *Wisconsin v. Federal Power Comm.*, 214 F.2d 334, 336 (7th Cir. 1954), cert. den. 348 U.S. 883 (1954).) Logging drives, while perhaps not a conventional mode of navigation, thusly satisfy the flexible and expansive title test of navigability. Floatplane use deserves comparable consideration.

B. Floatplanes Constitute Proper Evidence of Navigability Under Judicial Precedents, Administrative Decisions Issued by Appellees Themselves, and Federal Statutes and Regulations

The issue in this case has not heretofore been addressed by the federal courts. Yet the relevance of floatplane use to determine a waterway's navigability for sovereign title purposes is mandated by analogous judicial precedents, federal statutes, and regulations, the government's own administrative decisions and—most importantly—the flexible nature of the general federal test of navigability itself.

The navigability standard, like American constitutional law generally, has permitted the flexibility necessary to respond to technological change and societal growth. The first navigability cases, which dealt with admiralty rather than title disputes, were prophetic in anticipating this need. The language of *The Montello*, 87 U.S. (20 Wall.) 430, 441-442, contrasts with the Court of Appeals' more narrow construction of that case:

> "If [a waterway] be capable in its natural state of being used for purposes of commerce, *no matter in which mode the commerce may be conducted*, it is navigable in fact and becomes in law a public river or highway. Vessels *of any kind* that can float upon the water . . . are or *may become, the mode by which a vast commerce can be conducted*, and *it would be a mischievous rule that would exclude either in determining the navigability of a river.*" (Emphases added.)

This Court reiterated this fundamental point when it reviewed the first century of navigability jurisprudence in *United States v. Appalachian Electric Power Co., supra*, 311 U.S. 337, 405-406:

> "It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the western mountains. *The test as to navigability must take these variations into consideration.*
>
> "*. . . Each application of this test . . . is apt to uncover variations and refinements which require further elaboration.*" (Fns. omitted; emphasis added.)

The Court expanded upon this notion in more recent cases upholding Utah's sovereign claims to the beds of its lakes and rivers:

> "[A]s the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored . . . . The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources." (*United States v. Utah*, 283 U.S. 64, 83 (1931).)

Floatplane use, while relatively novel, represents the type of technological adaption to the needs of commerce which the federal navigability test traditionally has accommodated. Floatplanes have developed to serve Alaska's citizens in a multitude of

ways, and these craft are wholly dependent on waterways such as Slopbucket Lake for their operation. Like *The Montello*, this case concerns a craft, capable of floating on water, that indisputably forms a vital link of Alaskan commerce. Floatplanes use the lake "as a highway and that is the gist of the federal test." (*Utah v. United States*, 403 U.S. 9, 11 (1971).)

Notably, the United States has embraced these principles in its own administrative decisions, (See, e.g., *Appeal of Doyon, Ltd.*, 86 Interior Dec. 692, 705 (1979).)

A similar approach is reflected in federal statutes and regulations concerning the legal status of floatplanes and similar craft. (See, e.g., 33 U.S.C. § 1601(1) (International Navigation Rules Act of 1977); 33 U.S.C. § 2003(a) (Inland Navigation Rules); 43 C.F.R. § 2650.0-5 (BLM regulations implementing Alaska Native Claims Settlement Act defining "major waterway" as one having significant use "by watercraft, including floatplanes . . ."); 36 C.F.R. § 328.5(a) (requiring that seaplanes while upon water operate in accordance with marine rules for power boats and other vessels); 35 C.F.R. § 111.31 (establishing rules of navigation for seaplanes and related craft on waters within Panama Canal).)

A ruling that floatplanes constitute relevant evidence of navigability for title purposes, therefore, is both mandated under applicable judicial precedents and consistent with analogous federal statutes, regulations and administrative determinations.

C. Important Public Policy Considerations Require That the Sovereign States Not Be Divested of the Beds of Their Vital Waterways Through an Excessively Narrow Interpretation of "Navigability"

The policy ramifications of the decision below are extensive. This nation's waterways represent important commercial arteries and resources, opportunities for recreational diversion in our increasingly hectic society and irreplaceable environmental treasures. (See, e.g., *Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892); *Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 454, 456 (1851); Coastal Zone Management Act, 16 U.S.C. §§ 1451, 1453-1464; R. Dewsnep, *Public Access Rights in Waters*

and Shorelands (1971).) The holding below that evidence of floatplane use is inadequate as a matter of law to establish sovereign title portends serious restrictions on the use of lakes and rivers and will work a great wrong upon the public for whom these lands are held in trust. (E.g., *Illinois Central Railroad v. Illinois, supra; Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (9th Cir. 1884).)

Early in our nation's history, the courts perceived that mechanical and rigid views of navigability would have an untoward effect on the public interest. For example, American courts quickly rejected the so-called English common law rule limiting navigable waters to those in which the tide ebbed and flowed. They did so based on the ineluctible view that this country's countless inland navigable waters, encountered and utilized in conjunction with the nation's westward expansion, made that rule wholly unsuitable here. (See, e.g., *Shively v. Bowlby,* 152 U.S. 1, 31 et seq. (1893).)

Similar considerations exist in the present case. The importance of the public rights involved mandates a flexible and expansive interpretation of navigability. As one state court noted:

> "We must at this point examine the *ultimate* fact of navigability under the 'public purposes' test. That we may do so should be unquestioned." (*In re Martiny Lakes Project,* 381 Mich. 180, 212, 160 N.W. 2d 909, 925 (1968); emphasis in original.)

This Court recognized well over a century ago that sovereign lands represent a most fundamental incident of state sovereignty:

> "To give to the United States the right to transfer to a citizen the title to the shores and the soils under navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty and deprive the states of the power to exercise a numerous and important class of police power." (*Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845).)

For these reasons, the Court of Appeals' opinion in this case represents unsound policy as well as erroneous legal analysis.

CONCLUSION

For the foregoing reasons, amici join the State of Alaska in urging that the Court issue its writ of certiorari in this case.

DATED: July 26, 1985

Respectfully submitted,

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